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No. 97-1243

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.
AND
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Respondent, United States Department of the Interior (Interior), argues that the decision of the court of appeals does not warrant review by this Court for three reasons.[1] First, Interior claims that this case "does not squarely present the issue on which the circuits have split." Resp. Br. 9–10. Second, Interior states that "the conflict in the circuits does not have enough

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[1]Respondent's brief also is directed to the petition for a writ of certiorari filed by the National Federation of Federal Employees, Local 1309 (NFFE) in *NFFE v. Department of the Interior*, petition for cert. pending, No. 97-1184. NFFE's certiorari petition seeks review of the same Fourth Circuit judgment at issue in the instant case.

practical significance to warrant this Court's review." Resp. Br. 11. Third, Interior argues that, in any event, "the Fourth Circuit's decision was correct on the merits." Resp. Br. 12. However, for the reasons stated in the Authority's petition for a writ of certiorari, and for the reasons stated below, the issue presented should be decided by this Court.

I. The Decision of the Court Below Directly Conflicts with that of the District of Columbia Circuit

As framed by petitioner, Federal Labor Relations Authority (Authority), the question presented to the Court is whether, under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101–7135 (1994 & Supp. II 1996) ("the Statute"), a federal agency employer is required to negotiate over a proposal that would create a contractual obligation to bargain over union-initiated midterm proposals. Interior mistakenly objects (Resp. Br. 9) that the question does not present a square conflict between the circuits because that question is "separate from, and susceptible to resolution independently of, the fundamental statutory question that has divided the Fourth and D.C. Circuits."[2]

As the Fourth Circuit acknowledged, "[u]nderlying the conflicting contentions of the parties in this case is a

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[2]In *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU v. FLRA*), the D.C. Circuit held that under the Statute, an agency employer is obligated to bargain, with certain exceptions, over union-initiated midterm proposals. The Authority has adopted and continues to adhere to this interpretation of the Statute. However, in *Social Security Admin. v. FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA v. FLRA*), the Fourth Circuit expressly disagreed with the D.C. Circuit in reaching the opposite conclusion, namely that the Statute does not so obligate agency employers.

clear conflict on the issue of union-initiated midterm bargaining proposals between this circuit and the D.C. Circuit." Pet. App. 5a. In our view, the Court cannot resolve the narrower negotiability issue without resolving the statutory question that has split the Fourth and D.C. Circuits. Interior ignores the fact that it was the Fourth Circuit's *SSA v. FLRA* decision that formed the sole basis of its subsequent determination that midterm bargaining is not only not required by the Statute, but not negotiable as well. *See United States Department of Energy v. FLRA*, 106 F.3d 1158, 1163–64 (4th Cir. 1997) (*Energy v. FLRA*) ("our reasoning in [*SSA v. FLRA*] compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is . . . not negotiable.").[3]

Further, and in any event, if the Court were to decide the case narrowly and specifically address only the question of whether unions may negotiate for the right to bargain midterm, a direct and significant conflict in the circuits would be resolved.[4] Interior does not dispute that there is an effective split between the circuits on whether midterm bargaining is negotiable.[5]

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[3]The court of appeals' most extensive discussion of the issue is in *Energy v. FLRA*. The court found the instant case controlled by *Energy v. FLRA* and explicitly relied upon its reasoning. Pet. App. 9a–11a.

[4]That the right to bargain midterm may be bargained for, irrespective of a statutory right to do so, was one of the two alternate grounds the Authority relied upon in its decisions finding the matter negotiable. The other was that a proposal providing for midterm bargaining restates a statutory obligation. *See* Pet. 14–15.

[5]As pointed out in our petition (Pet. 12), although the D.C. Circuit has not been presented with the precise question of negotiability, its answer is implicit in its decision in *NTEU v. FLRA*. If midterm bargaining is mandated by the Statute, it follows necessarily that a contract provision calling for such bargaining is consistent with the Statute, *i.e.*, is negotiable.

Resolution of even this narrower question will further the recognized goal of uniform application of statutory rules and procedures. *See* Pet. 13.[6]

Contrary to Interior's protestations, this case presents a clear and direct conflict with the holdings of the D.C. Circuit. As summarized by both the Authority and NFFE, the Fourth Circuit has held that an agency may not agree to do what the D.C. Circuit concludes that it is statutorily obligated to do.[7]

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[6]Of course if the Court would find, in agreement with the Fourth Circuit, that the Statute prohibits midterm bargaining, that would resolve, *a fortiori*, the broader question of whether there is a statutory obligation to bargain midterm.

[7]Interior mistakenly suggests (Resp. Br. 9 n.2) that the Authority did not adequately preserve its challenge to the court of appeals' determination in *SSA v. FLRA* that there is no statutory obligation to bargain midterm. Although the Authority's pleadings to the Fourth Circuit did not specifically urge the court to overturn *SSA v. FLRA*, in its decisions on review in both the instant case and in *Energy v. FLRA*, the Authority continued to assert its disagreement with that decision. Pet. App. 19a; *see also U.S. Department of Energy, Washington, D.C.*, 51 FLRA 124, 127–28 and notes 4 and 5 (1995). Further, in *Energy v. FLRA*, the court recognized the Authority's disagreement with the *SSA v. FLRA* decision, but stressed that it could not uphold an agency determination that "flouts [the court's] previous statements on the law." 106 F.3d at 1162 n.8. In its brief to the court of appeals in the instant case, the Authority noted both its continued disagreement with *SSA v. FLRA* and the court's footnote in *Energy v. FLRA*. *See* Authority Brief 7–8 and n.6.

The Court has recognized that in a situation like this it is "unreasonable" to require "as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection." *United States v. Williams*, 504 U.S. 36, 44 (1992). Review of a matter is proper where, as here, "although the petitioner did not contest the

II. The Question Presented is a Significant One

As we stated in our petition (Pet. 13), continuation of this conflict will proliferate litigation and uncertainty within the federal sector labor relations community. Interior mistakenly seeks to downplay the practical effects of the conflict, as well as the potential for continued litigation.

Interior's claim (Resp. Br. 11) that the conflict lacks any "practical significance" is inconsistent with its own characterization of the situation. Interior argues that requiring a federal agency to engage in midterm bargaining, whether through collective bargaining or as a matter of statutory construction, "would pose a unique set of problems that would threaten the stability of federal labor relations." Resp. Br. 12. Further, according to Interior, union-initiated midterm bargaining "risks serious interference" with effective and efficient government and "diminish[es] the parties' ability to rely on the collective bargaining agreement as a stable foundation for daily relations. . . ." Resp. Br. 12–13.

If Interior is truly of the view that such dire consequences would ensue from midterm bargaining, then the question presented is significant. Moreover, Interior should welcome the opportunity to challenge the Authority's determination regarding midterm bargaining. We, of course, disagree that midterm bargaining will have the deleterious effects envisioned by Interior. *See* Pet. 17–18 and cases cited there; *see*

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issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *Id.* at 44–45.

also Department of Defense v. FLRA, 659 F.2d 1140, 1157 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) ("in collective bargaining, government managers are presumably competent to look out for government interests."). Rather in our view, prohibiting midterm bargaining is inconsistent with Congress' declaration in section 7101(a)(1) of the Statute that collective bargaining is in the public interest. *See* Pet. 16; *see also* NFFE Pet. 8.

Similarly, Interior's suggestion that the litigation potential of this issue is limited is belied by the conduct of the Department of Justice in its representation of government agency employers. Contrary to Interior's contention, agencies have continuously litigated this issue.[8] First, when the Authority sought to enforce its decision adopting the D.C. Circuit's position that midterm bargaining was mandated by the Statute, the Internal Revenue Service took the highly unusual step of seeking initial hearing *in banc*. *FLRA v. Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988). Second, when presented the opportunity, the Social Security Administration sought review of the Authority's midterm bargaining rule in a circuit other than D.C. *SSA v. FLRA*, 956 F.2d 1280.

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[8]Equally inapposite is Interior's disingenuous claim (Resp. Br. 11) that it is uncommon for *unions* to seek judicial resolution of midterm bargaining disputes. When the Authority initially ruled that midterm bargaining was not mandated by the Statute, the National Treasury Employees Union sought review and prevailed in *NTEU v. FLRA*. *See* Pet. 5–6. Since the Authority adopted the view of the D.C. Circuit, unions have had their right to bargain midterm upheld by the Authority. Obviously, they have had no need to seek review of these decisions.

Subsequent to the Fourth Circuit's decision in *SSA v. FLRA*, agency employers have pursued review of midterm bargaining cases on numerous occasions when review was available in that court.[9] Further, Interior overstates the significance of the fact that the conflict is "confined to the Fourth and D.C. Circuits." Resp. Br. 11. Although currently limited to two circuits, the conflict is clear, entrenched, and as a practical matter unresolvable.

Moreover, venue considerations suggest that the litigation will continue. Under section 7123(a), the D.C. Circuit is an appropriate venue for review of all Authority decisions. The alternative venue is anywhere an aggrieved person resides "or transacts business." As federal agencies often transact business nationwide, the Fourth Circuit is also likely to be an appropriate venue in many, if not most, cases.

Failure to resolve the conflict in the circuits on this matter will serve only to continue an untenable situation. As the Fourth Circuit recognized, the split in the circuits, coupled with the uncertain venue provisions of section 7123 of the Statute, places the Authority in "a difficult position." *Energy v. FLRA*, 106 F.3d at 1162 n.8. Not knowing which circuit court ultimately will review its decision, the Authority, irrespective of the course taken, will find itself in a position of not complying with a previous decision of a federal circuit court of appeals. *See Energy v. FLRA*, 106 F.3d at 1167–68 (reprinted letter to the court from the FLRA). This quandary can and should be resolved by the Court. *See* Pet. App. 11a.

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[9]In addition to the instant case and *Energy v. FLRA*, the agency employer sought review in *U.S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *enforcement denied*, 991 F.2d 790 (4th. Cir. 1993) (Table).

III. The Decision of the Court of Appeals is Erroneous

Interior mistakenly contends (Resp. Br. 12) that review is unwarranted because the decision of the court of appeals is correct on its merits. As we argued at some length (Pet. 14–26), the court below was in error in two respects. First, the union's proposal was negotiable because it merely restated a statutory obligation. The court of appeals' contrary decision in *SSA v. FLRA* was wrongly decided. *See* Pet. 14–19. In that regard, Interior's argument (Resp. Br. 12) that subsections 7106(b)(2) and (3) of the Statute constitute the only exception to a prohibition on midterm bargaining misses the mark. The source of the Statute's broad obligation to bargain is not section 7106, but sections 7103(a)(12) and 7117. *See* Pet. 3. As we noted (Pet. 16 n.5), section 7106 only reserves certain matters to management discretion and, therefore, concerns only the scope (*i.e.*, the appropriate subject matters) of bargaining, not the timing of the bargaining obligation. In turn, subsections 7106(b)(2) and (3) constitute provisos which clarify and/or modify the scope of the reserved rights found in section 7106(a). *See AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1186–87 (D.C. Cir. 1983) (Opinion by Judge, now Justice, Scalia).

Second, as we discussed (Pet. 19–26), even if there were no statutory obligation to bargain midterm, a contract provision providing for midterm bargaining is negotiable because it is not inconsistent with applicable law, rule, or regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

Respectfully submitted,

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[10]The Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.